1992

GNS v. Fullmer : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

GNS PARTNERSHIP; BRYSON GARBETT; JAN GARBETT; DAVID NIPPER; BETTY NIPPER; WHITE WATER CORPORATION, and BRIAN STEPHENSEN, Partners, Plaintiffs-Appellants, vs BRAD FULLMER, Defendant-Appellee,	)	Case No. 920763-CA Argument Priority No. 16

BRIEF OF APPELLEE BRAD FULLMER

APPEAL FROM SUMMARY JUDGMENT ENTERED BY
FIFTH DISTRICT COURT, WASHINGTON COUNTY
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JURISDICTION

The Court of Appeals has appellate jurisdiction pursuant to U.C.A. §78-2a-3(2)(k).

STATEMENT OF ISSUES PRESENTED FOR REVIEW, STANDARD OF REVIEW

This is a subrogation action brought by State Farm Insurance in the name of its insured, GNS Partnership.

1. The trial court properly concluded that where the dorm contract was silent on the issue of insurance, it was presumed that the landlord (GNS) would provide fire insurance for the benefit of the tenant (Fullmer) and GNS and that Fullmer was an implied co-insured for the limited purpose of subrogation.

Standard of Review: This case was decided on summary judgment. The trial court's conclusions of law are subject to review for correctness. Retherford v. AT&T Communications, 201 U.A.R. 21 (Utah 1992).

2. The trial court ruled correctly on State Farm's motion to strike the affidavit of Brad Fullmer.

Standard of Review: The trial court's rulings are mixed issues of law and fact, and are reviewable for correctness. Margulies by Margulies v. Upchurch, 696 P.2d 1195 (Utah 1985).

3. The trial court properly denied State Farm's Motion for Partial Summary Judgment. At a minimum, there were fact issues which would have precluded summary judgment in favor of State Farm.

Standard of Review: In order to rule in favor of State Farm, the trial court would have been required to ignore the conduct of the parties and rules of construction applicable to the dorm contract. There was either no evidence to warrant such disregard by the Court, or at a minimum, the parties' conduct would have created issues of fact. The trial court's conclusions of law are subject to review for correctness. Retherford, supra.

DETERMINATIVE STATUTES AND RULES

The trial court's judgment was entered pursuant to Rule 56, Utah Rules of Civil Procedure. However, no statute or rule is determinative of the issues before this court.

STATEMENT OF THE CASE

This is a subrogation action commenced by State Farm in the name of its insured against Brad Fullmer. At the time of the fire which gave rise to the claim, Brad Fullmer was a 20-year old college student at Dixie College residing in off campus student housing, The Wedge Apartments. (R. 144)

Shortly after Fullmer became a resident in the student housing, he used a charcoal grill on a balcony at the apartment. Many hours after the grill had been used, Fullmer deposited the ashes in a cardboard box and put them in a storage closet also on the balcony. During the night, a fire developed causing approximately $70,000.00 in damage. (R. 51, 52, 224, 225)

The dorm contract did not require Fullmer to procure insurance for the property. The dorm contract did not address insurance. (R. 147) Fullmer expected that the landlord would procure any necessary fire insurance on the structure. (R. 144)

The case came before the district court on competing motions for summary judgment. Based upon the modern trend of cases and public policy, Fullmer argued that he was a de facto co-insured of the landlord for purposes of subrogation, and that State Farm was not entitled to pursue a subrogation claim against him.

Based upon these competing motions for summary judgment, the trial court dismissed State Farm's claim against Brad Fullmer. (R. 235)

STATEMENT OF RELEVANT FACTS

In addition to the statement of facts set forth by the appellant, the following facts were not disputed:

1. At the time Brad Fullmer entered into the student housing agreement with The Wedge, he was a 20-year old college student. Brad Fullmer never understood from the agreement nor was he ever told by the owner or its representative that he would be required to purchase and carry property insurance insuring the structure and improvements in which he was going to reside. (Affidavit of Brad Fullmer, R. 144, 145)

2. The student housing agreement (R. 147) contains, among others, the following provisions:

> Rent: $335.00 PER QUARTER. . . . No monthly payments! . . .
>
> 3. . . . NO MEMBER OF OPPOSITE SEX IS ALLOWED IN THE BEDROOM, BATHROOM OR HALL AREAS! While there are no "dorm" hours, students are expected to leave and enter quietly after the 10:00 p.m. quiet hour. . . .
>
> 9. From time to time, it may be necessary to move one or more tenants to another apartment to accommodate remodeling and to achieve maximum occupancy per unit. . . .
>
> 16. Any tenant who has been given notice to vacate the premises by the Landlord for any reason whatsoever shall not be entitled to a refund of his or her deposit or rent. Names of all such persons shall be submitted to Dixie College as well as to their parents. It is the intent of the Landlord and their managers to keep The Wedge in superior condition.

3. None of the tenants of The Wedge Apartments, including Brad Fullmer, were required by GNS or by the lease to provide insurance for damage to the apartments or their furnishings. (R. 188).

4. State Farm did not require that the tenants, including Brad Fullmer, furnish or provide their own insurance for any damage which the tenant might negligently cause to the subject property, including its contents or structure. (R. 188).

5. State Farm's "Apartment Policy" provides in part that (page 28):

> 7. Subrogation.
>
> (a) . . . The insured shall do nothing after loss to prejudice such rights.
>
> (b) The Company shall not be bound to pay any loss if the insured has impaired any right or recovery for loss; however, it is agreed that the insured may:
>
> (1) as respects to property while on the premises of the insured release others in writing from liability for loss prior to loss, and such release shall not affect the right of the insured to recover hereunder; and . . . (R. 96)

6. Subsequent to the fire, Brad Fullmer was relocated to another apartment by the owners. Brad and his roommates resided there until they were asked to leave for reasons unrelated to the fire. The plaintiffs made no assessment against defendant or his roommates as a result of the fire. (Affidavit of Brad Fullmer, R. 208).

SUMMARY OF ARGUMENT

1. The trial court properly dismissed State Farm's claim for subrogation. Subrogation is not available against every negligent party. Insurance and subrogation revolve around risk, risk management and risk allocation. State Farm accepted the risk of loss in this case, and is not entitled to pass it on to the tenant,

Fullmer. The modern trend of cases and commentators recognize that in the absence of an express agreement in the lease to the contrary, that subrogation is not available to the landlord's insurance carrier against a negligent tenant. The tenant stands in the shoes of the insured landlord for the limited purpose of defeating a subrogation claim.

The modern trend of cases, including this Court's decision in Fashion Place Inv. v. Salt Lake County, infra, are supported by many public policy factors. Those factors include the reasonable expectation in a modern urban setting that the landlord's fire policy is for the benefit of both the landlord and the tenant, the general acceptance in the marketplace that the landlord's policy is for the benefit of both the landlord and the tenant, the recognition that the rent paid by the tenant pays for the insurance, and the impracticality of requiring a tenant to purchase millions of dollars of fire coverage simply to be a dormitory (or apartment) dweller.

The policy at issue gave the landlord the right to waive subrogation. Subrogation in this case would result in a windfall to State Farm, who set its rates not expecting to recover in subrogation.

2. The trial court properly excluded portions of David Houston's affidavit and admitted Brad Fullmer's affidavit. The

portions of Mr. Houston's affidavit that were stricken were not based on personal knowledge. Based upon statements made by the court during the course of its ruling on the motions for summary judgment, the rulings regarding both affidavits, even if incorrect, were harmless error.

3. The plaintiff's motion for summary judgment was properly denied. Even if this court should overturn the trial court's decision on Fullmer's motion for summary judgment, plaintiff's motion for summary judgment was properly denied. It was Fullmer's expectation that the landlord would provide fire insurance for his benefit. In addition, the conduct of the landlord and the tenant after the fire evidences their mutual understanding that the landlord's insurance was for the benefit of both the landlord and the tenant. The landlord's failure to require the tenant, in the lease, to provide insurance would require the court to add terms by implication to a contract prepared by the landlord. Summary judgment under these circumstances should not be determined adversely to Fullmer.

ARGUMENT

I

THE TRIAL COURT PROPERLY DISMISSED STATE FARM'S CLAIM FOR SUBROGATION.

It is clear that subrogation is not available against every negligent party. The Fashion Place Investments, Inc. v. Salt Lake County, 776 P. 2d 941 (Utah App. 1989); cert. den. 783 P. 2d 53 (Utah 1989), Board of Education v. Hales, 566 P. 2d 1246 (Utah 1977), and Bonneville on the Hill Co. v. Sloane, 572 P. 2d 402 (Utah 1977) cases each refused to allow subrogation against negligent occupants or users of property.

Fire loss is nearly always occasioned by negligence. The inherent nature of insurance is that it revolves around risk, risk management, and risk allocation. Board of Education v. Hales, 566 P. 2d 1246, 1247 (Utah 1977). This case is not about negligence. This case is not about proximate cause. This case is about who bears the risk of loss under all of the circumstances which exist. The trial court properly allocated the loss which occurred to State Farm.

It is "common experience" that a landlord keeps his premises insured against fire loss. Bonneville on the Hill Company v. Sloane, 572 P. 2d 402 at 404 (Utah 1977). In this case, the reasonable expectations or "common experience" of the parties - i. e. - that the landlord would provide property insurance - should

be given great weight. Pickover v. Smith's Management Corp., 771 P. 2d 664 at 668 (Utah 1989); Fashion Place Inv. v. Salt Lake County, 776 P. 2d 944 (Utah App. 1989).

A frequently cited case addressing subrogation claims of the type presented in this action is Sutton v. Jondahl, 532 P. 2d 478 (Okla. App. 1975). Sutton was cited favorably by this Court in Fashion Place, supra, at 944. In Sutton, a ten year old tenant performed a chemistry experiment which started a fire in the apartment. In the subrogation action brought against the tenant's parents by the landlord's insurance company, the court discussed the principle of subrogation as follows:

> Under the facts and circumstances in this record the subrogation should not be available to the insurance carrier because the law considers the tenant as a co-insured of the landlord absent an express agreement between them to the contrary, comparable to the permissive user feature of automobile insurance. This principle is derived from a recognition of a relational reality, namely, that both landlord and tenant have an insurable interest in the rented premises - the former owns the fee and the latter has the possessory interest. Here the landlords (Suttons) purchased the fire insurance from Central Mutual Insurance Company to protect such interest in the property against loss from fire. This is not uncommon. And as a matter of sound business practice the premium paid had to be considered in establishing the rent rate on the rental unit. Such premium was chargeable against the rent as an overhead or operating expense. And of course it follows then that the tenant actually paid the premium as part of the monthly rental.

> The landlords of course could have held out for an agreement that the tenant would furnish fire insurance on the premises. They did not. They elected to themselves purchase the coverage. To suggest the fire insurance does not extend to the insurable interest of an occupying tenant is to ignore the realities of urban apartment and single family dwelling renting. Prospective tenants ordinarily rely upon the owner of the dwelling to provide fire protection for the realty (as distinguished from personal property) absent an express agreement otherwise. Certainly it would not likely occur to a reasonably prudent tenant that the premises were without fire insurance protection or if there was such protection it did not inure to his benefit and that he would need to take out another fire policy to protect himself from any loss during his occupancy. Perhaps this comes about because the companies themselves have accepted coverage of a tenant as a natural thing. Otherwise their insurance salesmen would have long ago made such need a matter of common knowledge by promoting the sale to tenants of a second fire insurance policy to cover the real estate.
>
> Basic equity and fundamental justice upon which the equitable doctrine of subrogation is established requires that when fire insurance is provided for a dwelling it protects the insurable interest of all joint owners including the possessory interests of a tenant absent an express agreement by the latter to the contrary. The company affording such coverage should not be allowed to shift the fire loss to an occupying tenant even if the latter negligently caused it. New Hampshire Insurance Co. v. Ballard Wade, Inc., 17 Utah 2d 786, 404 P. 2d 674 (1965). (at 482) (Emphasis added)

The text, 6A Appleman, Insurance Law & Practice, §4055 (1991 Supp.), and the Neubauer v. Hostetter, 485 N. W. 2d 87 (Iowa 1992)

infra, case, authorities relied on by State Farm, recognize the Sutton opinion as reflective of the "modern trend" of decisions on the issue of residential landlord-tenant subrogation. Sutton, and other cases reaching similar conclusions, have articulated policy factors which support the conclusion that the tenant should be treated as a co-insured under the landlord's policy absent an express provision to the contrary. These factors include:

(a) It is the reasonable expectation of the parties to the residential lease that, without an express provision to the contrary, the landlord carries fire insurance for the benefit of both the landlord and the tenant. Cascade Trailer Corp. v. Beeson, 749 P. 2d 761 (Wash. App. 1988); Sutton, supra, Bonneville on the Hill Company, supra.

(b) It would be illogical for both the landlord and tenant to procure separate insurance policies on the same property interest. The landlord has an enormously greater interest to see that the apartments are insured. The Utah Supreme Court has recognized that all fire insurance is of the "property" type, and not the "liability" type. Board of Educ. v. Hales, supra at 1247.

(c) As a matter of sound business practice, the premium paid by the landlord, GNS, for insurance had to be considered in establishing the rental rate of the unit, and in effect was paid by the tenant, Sutton v. Jondahl, 532 P. 2d at 482, supra. It would be

an "undue hardship" to require a tenant to obtain fire insurance when he is already paying for fire insurance on the premises through his rent. Rizzuto, supra, p. 690 .

(d) GNS, in the dorm contract, could easily have required that Fullmer furnish fire insurance on the premises, but did not, Sutton, supra; Rizzuto, infra.

(e) There is in most instances an enormous disparity in bargaining power with respect to apartment leases, and especially in this case involving a dorm contract with a tenant that even the landlord recognizes was a novice. (See language in "Guaranty" of the dorm contract, R. 148). The landlord could have unilaterally required the tenant to carry insurance, but did not. Sutton, supra.

(f) It would not likely occur to a reasonably prudent tenant that the premises were without fire insurance protection, or that it did not inure to his benefit and that he would need to take out another fire policy, Sutton, supra at 482; Cascade Trailer Corp. v. Jim Beeson, et al., 749 P. 2d 761 (Wash. 1988) rev. den. 1988. Rizzuto v. Morris, 592 P. 2d 688 at 691 (Wash. App. 1979). In this case, Fullmer testified that he would never have anticipated that he needed to insure the premises. (R. 144, 145).

(g) Fire insurance companies have come to accept the concept of tenants being co-insureds. Rizzuto, supra, at 690. If not, it would be expected that they would be promoting the sale to tenants of a second fire insurance policy to cover the real estate, which apparently they are not. Sutton, supra at 482. If State Farm did not expect to include GNS' tenants, including Fullmer, in its policy, it should have removed from its policy the right of GNS to release their subrogation rights. (See policy, R. 96, para. 7).

(h) Even State Farm assumed that it would not have subrogation rights. The Apartment Policy it issued gave the landlord the right to release State Farm's subrogation rights, (Policy, p. 28 "Subrogation," R. 96) Thus, State Farm's premiums to the landlord were necessarily based on the assumption that State Farm's subrogation rights would be released. Any subrogation recovery by State Farm would be a windfall. This court can safely assume, as the Utah Supreme Court recognized in Board of Education of Jordan School District v. Hales, 566 P. 2d 1246 (Utah 1977), that State Farm has, "after painstaking analysis [of losses because of fire . . . directly traced to some act or acts of negligence] . . . fixed its premium and issued its policy." (at 1247), and can further assume that this analysis "revolved around understanding and manipulating the concept of risk management, risk control, risk transference, risk distribution, risk retention, etc." (at 1247.)

State Farm has offered no evidence to suggest that the loss which occurred was not considered in setting its rates, or that the loss which occurred was of the type for which it expected to recover subrogation.

(i) Denial of a right of subrogation in cases such as this, where there is no express provision in the lease requiring the tenant to provide insurance, will reduce costly litigation. Alaska Ins. Co. v. RCA Alaska Commun., 623 P. 2d 1216, fn. 3 at p. 1219 (Alaska 1981).

(j) Denial of a right to subrogation prevents windfalls to insurers who have already assumed and been paid for the risk, avoids the cost to society of double insuring property, and places [illegible] where it was intended to be, on the landlord's insurance carrier who has collected premiums to cover the loss insured against.

Perhaps the policy reasons for denying subrogation rights to apar[illegible]ners' insurance companies, such as State Farm, and the po[illegible]f this litigation are best summarized in Robert Keeton's [illegible]ext on Insurance Law (1971) where it is stated that:

> Probably it is undesirable, from the point of view of public interest, that the risk of loss from a fire negligently caused by a [tenant] be upon the [tenant] rather than the [landlord's] insurer. Allowing the [landlord's] insurer to proceed against the [tenant] is surely contrary to expectations of persons other than those who have been exposed

> to this bit of law either during negotiations for a lease or else after a loss.

This Court, in the Fashion Place, supra, case, cited favorably to Sutton and many of the other cases which reflect the "modern trend," i.e., that in the absence of language to the contrary in the lease, it is expected that the owner will procure fire insurance for the benefit of both the landlord and the tenant.

In Fashion Place Investments, Inc. v. Salt Lake County, supra, Salt Lake County leased space from Fashion Place. The lease required the tenant to deliver up the premises at the end of the term in good condition, . . . "damage by fire and casualty not the fault of [Salt Lake County] . . . excepted therefrom." (at 943) (Emphasis added) The landlord was required by the lease to provide fire insurance on the building, which it did, but did not include the County as an "insured". The fire which resulted in the loss was caused by the negligence of county employees, and was the "fault" of Salt Lake County. Thus, in Fashion Place, this Court was faced with a subrogation action where the tenant and landlord had expressly agreed that the tenant would bear the loss resulting from the fire.

If, as State Farm incorrectly asks this Court to assume, negligence or liability of the tenant is the controlling factor in a subrogation action, the Fashion Place case should have been decided against the tenant. Especially where the County (the

tenant) had agreed in the lease to be liable for fires it caused. But the result of the Fashion Place action was against the insurance company - this Court held that the insurer (Safeco) could not recover in subrogation against the County.

An immaterial factual difference exists between the Fashion Place case and this action in that the lease in Fashion Place required the landlord to provide insurance. The lease in this case is silent as to who will provide insurance. This difference is immaterial, because as the Utah court recognized in Bonneville, and has been recognized in many other jurisdictions, Sutton, supra, in the absence of a contrary provision there is a presumed term in the lease that the landlord will provide insurance. Thus, in Fashion Place, the parties had simply placed in writing that which would have otherwise been presumed. This Court in Fashion Place found that where the landlord procured property insurance the tenant was a de facto coinsured, and held that "Safeco has no right to pursue a subrogation claim against [the tenant]." (at 945). By the same analysis, Brad Fullmer was a de facto coinsured of State Farm.

An analysis of the various cases on the issue of tenant liability reveals an apparent line of demarcation. This line is determined by whether:

(a) the jurisdiction (Utah included) adopts the premise that when the landlord purchases fire insurance it is for the

benefit of both the tenant and the landlord unless there is an express agreement to the contrary, (see Sutton, supra, and the discussion in Fashion Place Investment, supra, at 944 embracing Sutton and Rizzuto, infra); or

(b) whether the state applies the rule that where the agreement is silent as to who will carry the insurance, each party is responsible to do so. See for example Acquisto v. Hahn, 619 P. 2d 1237 (N. M. 1980) (a case relied on by State Farm at the trial level which has been overruled in C. R. Anthony Co. v. Loretto Mall Partners, 817 P. 2d 238 at 243 (N. M. 1991)) and Page v. Scott, 567 S. W. 2d 101 (Ark. 1978).

This Court has specifically embraced the Sutton and Rizzuto rationale in Fashion Place. The Utah Supreme Court has rejected the reasoning of cases contrary to Sutton. (See, for example, Board of Educ. v. Hales, 566 P . 2d 1246 at 1247, and its agreement with the dissent in McBroome-Bennett Plbg. v. Villa France, 515 S. W. 2d 32 (Tex. Civ. App. 1974).)

State Farm contends that Utah law allows subrogation against tenants except in three specific circumstances, relying upon Board of Education of Jordan School District v. Hales, 566 P. 2d 1246 (Utah 1977); and Fashion Place Investment, Inc. v. Salt Lake County, 776 P. 2d 941 (Utah App. 1989); and Bonneville on the Hill Co. v. Sloane, 572 P. 2d 402 (Utah 1977) to identify those

circumstances. In each of those cases, subrogation was denied against a negligent defendant. However, none of the cases suggest that instances in which subrogation will be disallowed are limited to those particular circumstances .

State Farm places considerable reliance upon a recent Iowa decision, Neubauer v. Hostetter, 485 N.W. 2d 87 (Iowa 1992), which specifically rejects this court's decision in Fashion Place. Neubauer relies extensively on a quote from the Appleman treatise which discusses the right of the insurer to decide who it will insure. This factor relied on in Neubauer is not applicable to State Farm's policy in this case, because State Farm gave its insured the right to waive State Farm's subrogation rights. Thus, it was not State Farm who was to decide who it would insure. State Farm passed that right to GNS. GNS gave away State Farm's subrogation right when it failed to require Fullmer to provide his own insurance. The result in the Fashion Place case also rejects Neubauer's reasoning. In Fashion Place, County was not a named co-insured. The insurer in Fashion Place did not "decide" to insure Salt Lake County. Salt Lake County, like Fullmer, was a "de facto co-insured."

Neubauer rejects without elaboration the extensive policy discussion in Sutton that in modern urban circumstances it is presumed, in the absence of an express agreement to the contrary,

that the landlord will provide insurance on the premises for the benefit of both the landlord and tenant. Sutton recognizes the disparate bargaining power between landlords and tenants. The thinness of Neubauer's reasoning is reflected in the statement that: "If the landlord had agreed to insure the tenant's interest in the property and failed to do so, the result might be different (p. 90)." Thus, even Neubauer turns upon the issue of whose obligation it is to provide fire insurance.

Contrary to the Iowa case, in Utah there is a presumption in all leases, based on "common experience," that the landlord keeps the premises insured against fire loss. (Bonneville on the Hill Co., supra, 572 P. 2d at 403-404.) As articulated in the Sutton, supra, case, a tenant is entitled to assume that the landlord's insurance is for his benefit, unless stated otherwise in the lease.

The presumption that insurance purchased by GNS was for the benefit of the tenant, unless expressly agreed otherwise, should be given even more emphasis in this particular case. The rental agreement at issue (R. 147, 148), while loosely referred to as a lease, is in reality a dorm contract. The dorm contract contains a provision for the parent's guaranty (which was not signed in this case). The guaranty recognizes that the agreement may be the student's "first experience with tenant/landlord relationships." The dorm contract called for quarterly and not monthly rental. The

rooms were furnished and the tenant's conduct was subject to restrictive limitations which would not ordinarily be found in rental agreements. Paragraph 6 of the agreement indicates that no refunds of deposits will be made to tenants who have breached the rules and regulations. The landlord even had the right to move Fullmer from unit to unit - much like a hotel guest. In spite of all of these rules, and the disparate bargaining power, there is nothing in the dorm contract to suggest that the landlord would not be insuring the property for the benefit of all involved, or that the tenant should obtain separate fire insurance.

The denial of subrogation to State Farm is consistent with prior Utah decisions, and consistent with the "modern trend" of cases. Sutton v. Jondahl, supra. Cascade Trailer Court v. Beeson, 749 P. 2d 761 (Wash. App. 1988); Safeco Insurance Co. v. Weisgerber, 767 P. 2d 271 (Idaho 1989); Safeco Insurance Co. v. Capri, 705 P. 2d 659 (Nev. 1985); Rizzuto v. Morris, 592 P. 2d 688 (1979); Alaska Insurance Co. v. RCA Alaskan Communications, Inc., 623 P. 2d 1216 (Alaska 1981); Fashion Place Inv. v. Salt Lake County, 776 P. 2d 944 (Utah App. 1989), cert. den. 783 P. 2d 53 (Utah 1989); Continental Insurance v. Bottomly, 817 P. 2d 1162 (Mont. 1991); Fireman's Insurance Co. v. Wheeler, 566 N. Y. S. 2d 692 (1991); Keeton, Basic Text on Insurance Law, §4. 4b (1971).

In Cascade Trailer Corp. v. Beeson, 749 P. 2d 761 (Wash. App. 1988) three men rented a dwelling unit from Cascade. A fire was started by one of the tenants when he left a pan of grease unattended on an electric stove. The lease required the tenants to redeliver the premises in good condition. The owner's insurance company paid the loss and brought a subrogation action against the tenant. The issue presented for resolution by the court was whether the tenants ". . . [were] implied co-insureds under Cascade's fire insurance policy, thus defeating the insured's right of subrogation against them?" (at 762) The Washington Appellate Court analyzed many of the cases which have addressed the issue, including the public policy issues which they presented and ruled in favor of the tenant stating (at 766):

> Whether rent covers all of the landlord's expenses, including insurance premiums [referring to Sutton] is not the critical question. Rather, the issue concerns the party's reasonable expectations. Where the landlord has secured fire insurance covering the leased premises, the tenant can reasonably expect the insurance to cover him as well, unless the parties have specifically agreed otherwise. Why? - because the tenant is in privity of contract with the landlord, and he has a property interest in the premises the insurance protects.

The court concluded:

> We adopt the reasonable expectations rationale of the Sutton line of cases and hold Cascade is presumed to carry its insurance for the

> tenant benefit because the lease did not contain an express provision to the contrary.

(at

As is true in this case, there was no requirement in the rental agreement in Cascade that required either the landlord or the tenant to provide insurance.

In Safeco Insurance Companies v. Weisgerber, 767 P.2d 271 (Ida. 1989), Safeco brought a subrogation action to recover amounts which it had paid on account of a fire caused by the negligence of a tenant in a rental home. On competing motions for summary judgment, the trial court ruled in favor of the tenant. The tenant testified that he did not obtain fire insurance on the real property because the landlord never requested that he do so and he did not feel it was his responsibility. The Idaho Court rejected the notion that the tenant should be liable and stated:

> denial of a right to subrogation in this instance prevents windfalls to insurers, prevents the double-insuring of property and places the risk where it was intended to be, on the landlord's insurance carrier which has collected premiums to cover the loss insured against." (at 274)

In Safeco Insurance Company v. Capri, 705 P.2d 659 (Nev. 1985) Safeco brought an action against a tenant who negligently caused a fire that burned down a rental property. The Nevada Supreme Court relied on many of the cases already discussed and made the following separate observations:

> It is not uncommon for the lessor to provide fire insurance on the leased property. As a matter of sound business practice, the premium to be paid had to be considered in establishing the rental rate. (661) . . .
>
> Moreover, insurance companies expect to pay their insureds for negligently caused fires and adjust their rates accordingly. In this context, an insurer should not be allowed to treat a tenant, who is in privity with the insured landlord, as a negligent third party when it could not collect against its own insured had the insured negligently caused the fire. (661)
>
> The *Rizzuto* [Rizzuto v. Morris, 592 P. 2d 688 (Wash. Ap. 1979)] court concluded that if the [landlord] did not expect to cover the [tenant] under the policy, then they should have expressly notified the [tenant] of the need for a second policy to cover its interest. "Since they failed to do so, they have no cause of action against the lessee for the fire damage, and the insurance company has no right of subrogation." (661)

In Continental Insurance Co. v. Bottomly, 817 P. 2d 1162 (Mont. 1991) the Montana Supreme Court adopted the rationale in Sutton and refused a subrogation claim arising out of a cabin fire. The fire was caused by the owner's brother who was a regular user, but not an owner, of the cabin. The Montana court focused particularly upon the discussion from Sutton that "subrogation is a fluid concept depending upon the particular facts and circumstances of a given case for its applicability. To some facts subrogation will adhere - to others it will not."

In Iowa National Insurance v. Boatright, 516 P. 2d 439 (Colo. 1973) the court rejected a subrogation claim against a father who negligently started a fire in his daughter's home.

State Farm attempts to argue that reasonable expectations of the parties to the lease should play no role in the outcome of this litigation. (State Farm Memorandum, p. 25). The Allen v. Prudential Property & Casualty Insurance, 839 P. 2d 798 (Utah 1992) case relied upon by State Farm addresses the issue of "reasonable expectations" in a very limited context where the express language in the insurance contract was contrary to what the insured claimed were her "reasonable expectations". In this case, the lease is silent on the issue of insurance. The Allen case has no factual relationship to this case.

The law generally is that a contract includes those items which were understood by or obvious to the parties in the circumstances of the agreement. This is especially true in this case where the contract is not integrated, and is silent on the issue of insurance. 17 A Am. Jur. 2d, Contracts §379. Fullmer testified that he did not understand he could have been required to obtain separate insurance, to insure the structure, and that he would have expected the owner to have his own insurance. (R. 144, 156). The owner did not testify that he had any different expectation. Under these circumstances, an implied term of the

lease was that the landlord would provide fire insurance for the benefit of the tenant and the landlord.

This court should also consider the interpretation of the lease given to it by the parties. Bullfrog Marina, Inc. v. Lentz, 501 P. 2d 266 (Ut. 1972). It is not the landlord that is pressing this case. It is the insurer. The landlord did not evict Fullmer because of the fire. The landlord did not attempt to recover any damages from Fullmer or his roommates based upon any language in the lease. No assessment was made by the landlord. It is clear from both the landlord and the tenant's conduct that they expected the landlord's insurer to repair the property in exchange for the premiums it had received. The conduct of both the landlord and tenant clearly evidences an understanding by them that the landlord was providing fire insurance on the property for their mutual benefit.

State Farm has attempted on several occasions in their brief (pages 24 and 22) to interject facts about whether or not Fullmer has coverage through his parents' homeowners policy. The only possible reason for State Farm to include this discussion is to affect the court's decision on the issue of liability. Rule 411 of the Utah Rules of Evidence would expressly exclude this type of evidence at trial. This discussion should not be considered by this court on the issue of liability. Even if it is considered,

there is no evidence to support the conclusion that even if Fullmer's parents had insurance, that it would cover the loss at issue, or what the limit of Fullmer's parents' policy was.

State Farm's argument raises a more disturbing public policy factor. The policy issued by State Farm insured the premises for $1.5 million. (R. 229) Even if Fullmer was required to obtain a tenant's policy, the policy would have had to have insured Fullmer for $1.5 million if it were to protect him from fire loss to the property. (The whole project could have burned.) And what about the family that has two children at college, each living in a large dormitory or apartment complex worth tens of millions of dollars. If State Farm's argument is adopted, that family would have to procure liability insurance with a face value of tens of millions of dollars. While insurance companies would no doubt enjoy the premium income from such policies, as a matter of public policy, it is far more reasonable for the insurer of the apartment or dormitory property to include the conduct of tenants in its evaluation of risks and in establishing premiums, thus placing the cost of insuring the risk upon the landlord, who then is in a position to pass it on to the tenant in a pro rata manner.

In any event, State Farm's attempt to interject this issue ignores the fact that it was the landlord's obligation to provide

fire insurance for the benefit of both parties, absent express language in the lease to the contrary.

The case of U. S. Fidelity & Guaranty v. Let's Frame It, 759 P. 2d 819 (Colo. App. 1988) (page 14 of State Farm's brief) is distinguishable on several bases. The most important of these is the specific requirement in the lease that the tenant maintain insurance, thus negating any implication that the landlord's insurance was for the benefit of both the landlord and the tenant.

On numerous occasions through its brief, State Farm misstates Sutton's holding as being that "a tenant is a co-insured simply because he is a tenant." (Page 21) Sutton's holding is actually much narrower, to wit, "that in the absence of an express agreement between [the landlord and tenant] to the contrary . . .". (532 P. 2d at 482) the tenant is an implied co-insured. State Farm then argues that as a practical matter the chances that such language would be included in the lease are "almost nill". This contention ignores reality. It is the landlord that prepares the lease and can place the language in the lease. It is the insurance company that can require the landlord to put the language in the lease. The insurance company can do this by eliminating the exceptions to subrogation in the policies. This court must assume that there is some competitive advantage to State Farm to issue policies which

allow landlords to waive subrogation rights and which do not force landlords to require tenants to obtain their own insurance.

Public policy should require that a tenant be affirmatively placed on notice in the lease of the need to obtain fire insurance to overcome the "reasonable expectation" that the landlord is obtaining insurance for their mutual benefit. In the absence of such notice or requirement in the lease, subrogation should be denied.

State Farm argues that to not find Fullmer ultimately liable in this case turns traditional tort law upside down. (Page 21) Indeed, insurance does, to a large extent, turn tort law upside down. Insurance protects people against negligence, even their own negligence. Insurance is a device used to allocate risk. Insurance is a device which allows parties to plan their affairs. Subrogation is but a narrow aspect of insurance. The wide factual variation in the cases which have applied and adopted Sutton emphasize the critical role that policy factors and the expectation of the parties have played in the determination of subrogation rights.

At the outset of this brief, Fullmer observed that this case is not about negligence or proximate cause, but is about allocation of risk. The district court's decision places the risk in this case exactly where it belongs, upon the insurance company that

established and accepted premiums, which were determined after consideration of all risks and in light of the landlord's right to give up the company's subrogation rights, to insure the premises against fire, and not on a 20-year old dorm resident. The district court's decision places the burden upon the landlord, who is in the position to expressly require the tenant in the lease to obtain insurance if the tenant was expected to do so. The district court's decision advances what Robert Keeton, supra, and the modern trend of cases calls the "reasonable expectations" of the parties.

II

THE TRIAL COURT RULED PROPERLY WITH RESPECT TO THE AFFIDAVITS OF BRAD FULLMER AND DAVID HOUSTON.

(a) David Houston Affidavit. Rule 56(e) of the Utah Rules of Civil Procedure provides that "supporting or opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." In addition, they must set forth "specific facts showing that there is a genuine issue for trial."

Mr. Houston's affidavit (R. 217) states that he was a claims superintendent for State Farm for five years. The affidavit goes on to make additional statements, some of which were stricken by the trial court. In particular, the trial court struck Mr.

Houston's testimony in paragraph 5 and 6 discussing his belief regarding homeowner's policies coverage and children living away from home and tenant policies.

The trial court's ruling striking those paragraphs was correct for several reasons. Houston does not set forth any personal knowledge regarding the Prudential policy which the stricken paragraphs purport to address or the extent of its coverage. The affidavit does not provide any foundation to support a conclusion that Houston has any knowledge of policies issued by any company other than State Farm. The affidavit does not state that Houston has any background in underwriting, or any experience except in claims. Houston's affidavit is not responsive to the issue of the reasonable expectation of the parties to the rental agreement. Mr. Houston's affidavit does not address the limits of coverage available in a tenant policy. Mr. Houston's affidavit does not address State Farm's underwriting practices, the factors State Farm considered in setting the premium for the apartments, and most curiously, whether or not State Farm expected that subrogation would be available at the time it wrote the policy and set its rates. The affidavit is not responsive to the proposition that in modern urban dwelling, it is presumed that the apartment owner will procure insurance for the benefit of both the owner and the tenant.

In summary, the stricken portions of the affidavit were not based on personal knowledge and were not relevant to the issues before the court.

State Farm has the burden to show that, in addition to the trial court's ruling being in error, that there is a "reasonable likelihood" that if the ruling had been otherwise there would have been a different result. Redevelopment Agcy. v. Mitsui Inv., Inc., 522 P. 2d 1370 (Utah 1974).

For all of these reasons, the court's ruling striking paragraphs 5 and 6 was correct because the affidavit was not relevant to any issue regarding liability and was not based on personal knowledge. If the court erred, it was in allowing any part of the affidavit to be received. At a minimum, any error was harmless error. Rule 61, U. R. C. P.

(b) Fullmer Affidavit. State Farm argues that Fullmer's Affidavit was based on hindsight, and as such, must be stricken. Initially, the trial court stated that the affidavit did not affect its decision. Therefore, any error in the trial court's ruling is harmless error. Rule 61, U. R. C. P.

Rule 401, Utah Rules of Evidence, provides that relevant evidence means evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the

evidence. It is not disputed in this action that insurance was not discussed at the time the lease was entered into and was not covered in the lease. Fullmer's statements about what he would have expected (R. 144, 145) are relevant to the issue of the reasonable expectation of the parties. As discussed previously, the reasonable expectations of parties to a contract, as well as their conduct in relation to the contract, are factors to be considered in construing obligations arising under the contract. In the context of plaintiff's Motion for Summary Judgment, Fullmer's Affidavit was probative of the issue of whether or not there was an implied agreement that the landlord would provide insurance on the property for the type of loss which occurred. Any contrary conclusion by the trial court would have required that court to ignore both the "general understanding in modern urban settings that the landlord provides property coverage" (Sutton) and Fullmer's understanding.

Fullmer's testimony may also be viewed as opinion testimony by a lay witness. Mr. Fullmer was a renter. The testimony is rationally based on his perception of the obligations of the landlord and tenant and is helpful to the determination of a fact in issue, to wit, the obligation of the landlord to provide insurance coverage for the benefit of both the landlord and the

tenant in the absence of an express contractual provision to the contrary.

The Webster v. Sill, 675 P.2d 1170 (Utah 1983) decision relied on by State Farm is inapposite. Webster dealt with a situation where an affiant attempted to contradict his earlier deposition testimony. Allen v. Prudential Property & Casualty Insurance Co., 839 P.2d 798 (Utah 1992) is also inapposite. In Allen, the reasonable expectation doctrine was rejected because the insurance agreement contained express language contrary to what the insured claimed was her reasonable expectation. In this case, the lease was silent on the issue of insurance.

The Utah Supreme Court has recognized that the "reasonable expectations doctrine is one in equity to protect against misapplying existing equitable doctrines." Allen, supra, p. 806. The application of the "reasonable expectations doctrine" to this subrogation action is appropriate.

For all of these reasons, Fullmer's affidavit was properly received.

III

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY DENIED.

It is Fullmer's position that pursuant to

a) an assumption based on common experience (Bonneville on the Hill, supra, at 404), and

b) the rule of construction approved of in Sutton and Rizzuto, supra, (and embraced in Fashion Place), that in the absence of a writing to the contrary, the landlord is obligated to provide fire insurance on the property for the benefit of both the landlord and the tenant.

State Farm's motion was based upon the premise that there was no factual issue about who was to provide fire insurance. Fullmer agreed -- there was no factual issue that the landlord was obligated to provide insurance for the benefit of both.

In its motion for summary judgment, State Farm asked the court to determine as a matter of law that Fullmer was not covered by the landlord's fire insurance. To rule in favor of State Farm, the court would have had to ignore the "reasonable expectations" (including Fullmer's affidavit) or the assumption based on common experience that the landlord's fire policy covered fire loss caused by Fullmer. The conduct of the parties before and after the fire, as discussed previously at p. 25-26, at a minimum, creates issues which preclude summary judgment against Fullmer. Fashion Place Inv. Ltd. v. Salt Lake County, supra.

In its motion for summary judgment, State Farm was asking the court to imply a term in the dorm contract requiring Fullmer to provide fire insurance. The landlord drafted the lease and it should be construed against the landlord. Neither this court nor

the trial court should not be adding implied terms to the lease favorable to the drafter in summary judgment proceedings. Amoco Production v. Lindley, 609 P. 2d 733 at 745 (Okla. 1980).

Fullmer's affidavit, the reasonable expectation of the parties, the conduct of the parties, and the absence of language in the lease would have to be considered in a light most favorable to Fullmer, and at a minimum, would create issues of fact precluding summary judgment in favor of State Farm.

State Farm's motion asserted that the landlords could have reasonably expected that the homeowner's insurance on Fullmer's parents' permanent residence would provide liability coverage for fire damage caused by Fullmer's negligence. The landlords never stated this by affidavit or otherwise and there is no factual basis to support this position. In fact, the landlords did not require insurance or evidence of insurance by the tenant as a condition of occupancy.

State Farm's assertion, through Houston's affidavit, that State Farm understood Fullmer had liability coverage through a separate homeowner's policy, as discussed previously, is directly contrary to Rule 411 of the Utah Rules of Evidence, and should not be considered by the court in determining liability. Robinson v. Hreinson, 409 P. 2d 121 (Utah 1965). Furthermore, State Farm's understanding after the fact has nothing to do with the reasonable

expectations of the parties (GNS and Fullmer) at the time the lease was signed.

For these reasons, summary judgment in favor of State Farm was properly refused.

CONCLUSION

For the foregoing reasons, this court should affirm the judgment of the district court dismissing the Complaint.

DATED this 18 day of March, 1993.

Keith W. Meade
COHNE, RAPPAPORT & SEGAL
Attorneys for Appellee

MAILING CERTIFICATE

The undersigned hereby certifies that on the 18 day of March, 1993, true and correct copies of the foregoing were mailed, postage fully prepaid, to the following:

Stuart H. Schultz
H. Burt Ringwood
Strong & Hanni
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da/fullmer.brf